IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

CHARLESTON DIVISION

IN RE:

ETHICON, INC.,

PELVIC REPAIR SYSTEM

PRODUCTS LIABILITY LITIGATION

MDL No. 2327

THIS DOCUMENT RELATES TO:

Ziehmer v. Ethicon, Inc., et al.

Civil Action No. 2:14-cv-17405

MEMORANDUM OPINION AND ORDER

Pending before the court is a Motion to Dismiss with Prejudice filed by Ethicon, Inc., and

Johnson & Johnson (collectively "Ethicon"). [Docket # 12]. Plaintiff has responded, Ethicon has

replied, and I have considered the parties' filings.

Ethicon's Motion arises from this court's Order [Docket # 10], entered on July 8, 2015,

denying Ethicon's Motion for Sanctions, including monetary penalties, dismissal and any other

sanction deemed appropriate by the court, for failure to file a Plaintiff Profile Form ("PPF") in

compliance with Pretrial Order # 17 [Docket # 7]. In reaching this decision, I relied on Wilson v.

Volkswagen of America, Inc., 561 F.2d 494 (4th Cir. 1977), in which the Fourth Circuit identified

four factors that a court must consider when reviewing a motion to dismiss on the basis of

noncompliance with discovery. (See Order [Docket # 10], at 3–6 (applying the Wilson factors to

Ms. Ziehmer's case)).1 Concluding that the first three factors weighed in favor of sanctions as

¹ The *Wilson* factors are as follows:

(1) Whether the noncomplying party acted in bad faith; (2) the amount of prejudice his noncompliance caused his adversary, which necessarily includes an inquiry into the materiality of the evidence he failed to produce; (3) the need for deterrence of the particular sort of

noncompliance; and (4) the effectiveness of less drastic sanctions.

requested by Ethicon, I nevertheless declined to award the requested sanction of \$100 for each day

the plaintiff's PPF was late because it would offend the court's duty under Wilson's fourth factor,

which is to consider the effectiveness of lesser sanctions. In recognition of this duty, I gave the

plaintiff "a final chance to comply with discovery." (Id. at 7). I afforded her 30 business days from

the entry of the Order to submit to Ethicon a completed PPF, with the caveat that a failure to do so

"will result in dismissal with prejudice upon motion by the defendant." (Id.).² Despite this

warning, Ms. Ziehmer has again refused to comply with this court's orders and did not provide

Ethicon with her PPF within the 30-day period. Consequently, Ethicon moved to dismiss the case

with prejudice.

Because the less drastic sanction instituted against Ms. Ziehmer has had no effect on her

compliance with and response to this court's discovery orders, which she has continued to blatantly

disregard, I find that dismissal with prejudice is now appropriate. For the reasons explained in my

July 8, 2015 Order [Docket # 10], Ethicon's Motion to Dismiss with Prejudice [Docket # 12] is

GRANTED. This case is **DISMISSED** with prejudice. The court **DIRECTS** the Clerk to send a

copy of this Order to counsel of record and any unrepresented party.

ENTER: October 8, 2015

JOSEPH R. GOODWIN

UNITED STATES DISTRICT JUDGE

Mut. Fed. Sav. & Loan Ass'n v. Richards & Assocs., Inc., 872 F.2d 88, 92 (4th Cir. 1989) (citing Wilson, 561 F.2d at 503-06)

² I also ordered plaintiff's counsel to send a copy of the order to the plaintiff via certified mail, return receipt requested, and file a copy of the receipt (*id.* at 7), and counsel has complied [Docket # 11].

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